

February 1, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 04-40802

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FLEMING COMPANIES, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern Division of Texas
4:03-CV-380-RAS

Before SMITH, DENNIS, and PRADO, Circuit Judges.

EDWARD C. PRADO, Circuit Judge:*

In this appeal, Plaintiff-Appellant Fleming Companies, Inc. challenges the "Batter-Coating Rule,"¹ a regulation promulgated by the U.S. Department of Agriculture ("USDA") pursuant to the Perishable Agricultural Commodities Act ("PACA"),² on two grounds: first, that the rule is invalid pursuant to *Chevron U.S.A., Inc.*

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

¹ 7 C.F.R. § 46.2(u) (2005).

² 7 U.S.C. § 499a-s (1996).

v. National Resources Defense Council, Inc.;³ second, that the USDA's decision-making with regard to the Batter-Coating Rule was "arbitrary and capricious" in violation of the Administrative Procedures Act ("APA").⁴ Essentially for the reasons articulated by the district court in its comprehensive opinion on motions for summary judgment, *Fleming Companies, Inc. v. U.S. Department of Agriculture*, 322 F.Supp.2d 744 (E.D.Tex. 2004), we AFFIRM.

³ 467 U.S. 837 (1984).

⁴ 5 U.S.C. § 706(2)(A) (1996).